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Receivers, Churches and Nonprofit Corporations: A First Amendment Analysis

Religion has become big business.¹ As the assets of religious corporations grow and religious bodies increasingly engage in nonworship activities, an increase in litigation involving religious organizations should be anticipated.

Churches are repeatedly subsumed under the general heading of nonprofit corporations in cases,² treatises³ and statutes,⁴ and it is assumed that that body of law is applicable. Principles which are allegedly applicable to a class may, however, be singularly inappropriate as applied to a member of that class. This is especially so when legal rules derived from business corporations practice are applied to religious organizations which are granted special constitutional protections. This note examines the propriety of a specific judicial remedy, receivership, in the nonprofit context⁵ and in the unique nonprofit context of churches. Constitutional problems are manifest when a receiver is imposed upon a religious body, and religious organizations should find some protection within the scope of the establishment⁶ and free exercise clauses of the first amendment.⁷ It is not, however, always obvious that a church's first amendment rights have been abridged. Determination of the degree to which receivership may abridge those rights requires a

¹ Statistics are necessarily incomplete because of theological objections raised by some churches to the gathering and reporting of information and because many independent churches are not affiliated with any general church or denomination to which data would be reported. Nonetheless, 43 demoninations reported total contributions in excess of \$6.2 billion in 1977. U.S. DEPT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 55 (99th ed. 1978). Almost \$931 million was expended in 1970 for religious construction. By 1977, this figure had increased by 12.8%. Not included in these figures are the amounts expended by religious organizations for hospitals, schools and more specifically secular endeavors. *Id.* at 779. See generally A. BALK, THE RELIGION BUSINESS (1968).

² See, e.g., *Gospel Tabernacle Body of Christ Church v. Peace Publishers & Co.*, 211 Kan. 420, 506 P.2d 1135 (1973).

³ See, e.g., H. OLECK, NON-PROFIT CORPORATIONS § 348 (3d ed. 1974).

⁴ See, e.g., IND. CODE §§ 23-7-1.1-2(d), -3 (1976 & Supp. 1980). Only West Virginia denies religious bodies the right to incorporate. See W. VA. CONST. art. VI, § 47.

⁵ See notes 56, 67 & accompanying text *infra*.

⁶ U.S. CONST. amend. I; see notes 92-138 & accompanying text *infra*.

⁷ U.S. CONST. amend. I; see notes 139-70 & accompanying text *infra*.

Additional protection can be found in the equal protection clause of the fourteenth amendment and in the fourth amendment's guarantees against unreasonable search and seizure. These protections are especially important inasmuch as they should be available to secular and religious nonprofits alike. Fourth and fourteenth amendment issues are, however, beyond the scope of this note.

careful analysis of a given state's law. Here, focus will be placed upon the law of California.

This note will examine the first amendment problems with applying the remedy of receivership to churches. It will focus upon and be illustrated by one California religious corporations case, *Worldwide Church of God v. Superior Court*,⁸ and will argue that such cases must always be adjudicated in light of the religion clauses of the first amendment. Attention will be directed to the charitable trust theory⁹ by which California justified its involvement in the affairs of nonprofits. Receivership will be examined in the nonprofit context, and the constitutional ramifications of both the remedy and the charitable trust theory on which this particular application of the remedy is based will be explored. This note will then conclude that the charitable trust theory which gives the state standing to bring suit against the religious nonprofit offends the establishment clause and that the indiscriminate remedy of receivership offends the free exercise clause.

WORLDWIDE CHURCH OF GOD V. SUPERIOR COURT

For over a year California courts were embroiled in litigation arising out of the imposition of a receivership upon a nonprofit church corporation.¹⁰ In the case that engendered this imbroglio, *Worldwide Church of God v. Superior Court*, the state of California sought a receiver for the defendant church and for Ambassador College, Inc. and Ambassador International Cultural Foundation, Inc., both nonprofit California corporations and arms of the church.¹¹ Acting under statutory authority,¹² the

⁸ *People v. Worldwide Church of God*, No. C 267 607 (L.A. Super. Ct., filed Jan. 2, 1979), *mandamus denied*, *Worldwide Church of God v. Superior Court*, No. 31091 (Cal. March 22, 1979), *cert. denied*, 444 U.S. 883 (1979), *cert. denied*, 100 S. Ct. 1846 (1980), *cert. denied*, 100 S. Ct. 2974 (1980) (dismissed from L.A. Super. Ct., Oct. 16, 1980).

⁹ See notes 74-82 & accompanying text *infra*.

¹⁰ See *Post-Guyana Hysteria, State of California Occupies Headquarters of the Worldwide Church of God*, LIBERTY, May-June, 1979, at 1 [hereinafter cited as *Post-Guyana Hysteria*]; *California Presses Moves on Churches*, N.Y. TIMES, Nov. 11, 1979, at 53, col. 1. Political, as well as legal, concerns may have been present in *Worldwide Church*. It may be argued that this case was but a political response to the emergence of the cults which have made Jonestown, Synanon, Moonies and Scientology familiar names. *Post-Guyana Hysteria, supra*, at 4.

¹¹ Joined as defendants were: Herbert Armstrong, Pastor General of the church; Stanley Rader, general counsel and holder of numerous offices in all three church corporations; business associates of Rader; an accounting firm which Rader joined in founding; a proprietorship; and a partnership. Brief for Respondent, app. A, at 1, 444 U.S. 883 (1979). The absence of any published opinion or finding of facts by the superior court necessitates extensive reliance upon the briefs filed with the Supreme Court in support of and in opposition to the church's petition for certiorari.

¹²

A nonprofit corporation which holds property subject to any public or charitable trust is subject at all times to examination by the Attorney

attorney general alleged that the defendants diverted assets for their own benefit and sought an accounting and appointment of a receiver pendente lite to prevent the continuing misappropriation of funds and destruction of evidence.¹³

The legal theory advanced by the attorney general was based upon charitable trust principles, with the people of California portrayed as the beneficiaries of the trust.¹⁴ The superior court granted the petition ex parte and ordered the receiver "to take possession of all Church assets, books and records and to take legal action to 'protect' and recover Church assets."¹⁵

The day after the ex parte hearing, the receiver took physical control of church headquarters and discharged certain church employees.¹⁶ When the church petitioned for dissolution of the temporary receivership, arguing that it violated the first amendment's free exercise clause,¹⁷ that petition was denied.¹⁸ A formal hearing one week after the ex parte action did produce some testimony regarding self-dealing,¹⁹ and

General, on behalf of the State, to ascertain the condition of its affairs and to what extent, if at all, it may fail to comply with trusts which it has assumed or may depart from the general purposes for which it is formed. In case of any such failure or departure the Attorney General shall institute, in the name of the State, the proceedings necessary to correct the noncompliance or departure.

CAL. CORP. CODE § 9505 (West Supp. 1979) (repealed 1980).

¹³ Brief for Respondent, *supra* note 11, at 5-6. Ordinarily the appointment of a receiver is an extraordinary remedy, granted only where there is danger of waste or destruction of the property in which another has an interest. 1 R. CLARK, A TREATISE ON THE LAW AND PRACTICE OF RECEIVERS § 54 (3d ed. 1959); see text accompanying notes 43, 58 *infra*. It may be surmised that the pending sale of the college's Big Sandy campus provided the requisite fact pattern for the court. This sale in the amount of \$10.6 million was in escrow at the time the receivership was imposed, but with the imposition of the receivership, the buyer cancelled. In his initial petition the attorney general alleged that the property was worth "substantially in excess of \$10.6 million . . . and these defendants have attempted to conceal the true worth." Brief for Respondent, *supra* note 11, app. A, at 16. Since the court ultimately ordered the receiver to consummate a sale of the property for \$10.6 million, the court may have believed that the imminent need requirement was satisfied by the attorney general's allegations of continuing fraud, coupled with the increasing influence of Mr. Rader and the incapacity of Mr. Armstrong. *Id.* app. A, at 6-10; see *Post-Guyana Hysteria*, *supra* note 10, at 6.

¹⁴ Brief for Petitioner, app. D, at 15-16, 444 U.S. 883 (1979); Brief for Respondent, *supra* note 11, app. A, at 6.

¹⁵ Brief for Petitioner, *supra* note 14, at 6-7 (footnote omitted). This charge is in the final order. *Id.* app. E, at 29-30.

¹⁶ *Id.* at 7.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ The respondent alleged that Rader had made personal house purchases with church funds; that there had been dealings between the church and Rader's law, advertising and accounting firms; and that there had been a leaseback of Rader's airplanes to the church. Brief for Respondent, *supra* note 11, app. B, at 22-43. Testimony was also heard regarding the shredding and removal of documents after the imposition of the receivership, *id.* app. B, at 44-69, and the alteration of bylaws, *id.* app. B, at 70-71.

the court formalized the receivership. The receiver was given the power

to supervise and monitor all of the business and financial operations and activities of the Church; however, he shall not interfere therein unless he determines, in the sound exercise of his sole discretion, that such interference is necessary to avoid damage or loss to the Church of any kind. And if he does so determine, then he shall have the right to take over management and control of the Church to whatever extent that he, in the sound exercise of his sole discretion, deems necessary.²⁰

The court recognized the potential free exercise problem inherent in that order, but attempted to avoid constitutional infirmity by carefully delineating the receiver's powers.²¹

Seven weeks after the receivership was first imposed, the court agreed to its dissolution, substituting injunctive relief and directing the church to give the attorney general's office access to its computer center and records.²² When this plan proved unworkable, a second receiver was appointed.²³ Shortly thereafter, church members subscribed \$3.2 million to meet the \$1 million stay bond set by the court.²⁴

Upon reinstitution of the receivership, the church sought a writ of mandate or prohibition from the California Supreme Court.²⁵ A closely

²⁰ Brief for Petitioner, *supra* note 14, app. E, at 28.

²¹ The court order stated:

10. *Non-Interference by Receiver in Ecclesiastical Affairs.*

It is not the purpose or intention of this Order to allow the Receiver to interfere in any way with the ecclesiastical functions of the Church (as distinguished from the College or the Foundation); and he shall not do so. This Receivership concerns itself exclusively with the financial and business affairs of the Church. The ecclesiastical affairs of the Church shall continue to be controlled and directed by its duly authorized ecclesiastical authorities. Notwithstanding the authority of the Receiver to terminate or suspend persons from employment . . . such termination or suspension shall in no way affect their membership or standing in the Church.

11. *Disputes as to whether a given matter is ecclesiastical.*

In the event of any dispute between the Receiver and the ecclesiastical authorities of the Church (as opposed to the College or the Foundation) over whether or not a particular matter is ecclesiastical, the authorities aforesaid are authorized to employ counsel to apply to this Court for a resolution of said dispute; and said counsel may thereafter apply for reasonable compensation from the Church funds pursuant to Court order.

Id. app. E, at 30-31.

²² *Id.* at 9-10.

²³ *Id.* app. G.

²⁴ *Id.* at 10-11. When a solvent defendant is already successfully operating property, the receiver's appointment may be stayed by the posting of a bond. *See, e.g., United States v. Dominion Oil Co.*, 241 F. 425 (S.D. Cal. 1917). While the attorney general originally objected on the ground that the sureties did not meet the requirements of CAL. CIV. PROC. CODE § 1057 (West Supp. 1979), he later withdrew this objection. Brief for Respondent, *supra* note 11, app. D.

²⁵ Brief for Petitioner, *supra* note 14, app. A. The order appointing a receiver ex parte is appealable and usually the appropriate writ is the writ of prohibition. *Golden State Glass*

divided court denied the petition.²⁶ Alleging infringement of its first amendment rights and extensive damage,²⁷ the church sought review by the United States Supreme Court on three different occasions.²⁸ Certiorari was denied,²⁹ and this case was scheduled to return to the Los Angeles Superior Court for determination of whether wrongdoing had occurred in the affairs of the nonprofit corporations prompted by legislated changes in the state corporations code, the attorney general subsequently dismissed as to all defendants.³⁰

Inferences should not be drawn from the fact that appellate courts have denied review.³¹ Nonetheless, such decisions can be analyzed and placed in a legal context. It is both timely and fitting to examine receivership as a remedy in the religious nonprofit context and to scrutinize the charitable trust theory to which attorneys general may appeal in justifying such a remedy.³²

Corp. v. Superior Court, 13 Cal. 2d 384, 90 P.2d 75 (1939). However, the histories of the writs of mandamus and prohibition are intertwined and "there are situations in which either writ may be proper." 43 CAL. JUR. 3d *Mandamus and Prohibition* § 1 (1978) (footnote omitted). The writ of mandamus may control abuses of judicial discretion, *id.* § 25, while the writ of prohibition may more specifically be used to challenge the appointment of a receiver, *id.* § 103.

²⁶ No. 31091 (Cal. March 22, 1979).

²⁷ Damages of both a financial and ecclesiastical nature were attributed to the receivership. Specifically, the church charged destruction of its superior bank credit lines, favorable vendor billing practices and balanced cash flow. Checks to media outlets for religious programming were bounced by the receiver along with beneficent payments to needy church members. Expected revenues during the first two months of the receivership dropped by \$2.75 million. In addition, \$150,000 of church assets were spent by the receiver for his own expenses. Losses attributed to the suit and to the receivership were set in excess of \$5 million for the fiscal year. The financial loss, petitioners claimed, directly caused the elimination or reduction of national youth programs, travel subsidies to needy members attending the Feast of Tabernacles, a newsstand distribution of church publications, educational programs for the handicapped, international programs, construction and education and training of employees. Brief for Petitioner, *supra* note 14, app. C. Petitioners further alleged that 90 employees, including ministers, were laid off due to budget reductions imposed by the receiver, *id.* app. C, at 11, and that "[t]he receiver hired a disfellowshipped member of the church to work at the headquarters, even though that was against the express beliefs of the church, and other church members are forbidden contact with disfellowshipped members." *Post-Guyana Hysteria*, *supra* note 10, at 8.

²⁸ 48 U.S.L.W. 3097 (U.S. May 15, 1979) (No. 78-1720); 48 U.S.L.W. 3667 (U.S. March 3, 1980) (No. 79-1348); 49 U.S.L.W. 3201 (U.S. Aug. 8, 1980) (No. 80-197).

²⁹ 444 U.S. 883 (1979).

³⁰ For the subsequent history of this case, see notes 82, 91 *infra*.

³¹ See generally Bice, *The Limited Grant of Certiorari and the Justification of Judicial Review*, 1975 WIS. L. REV. 343 (1975); Jaffe, *The Right to Judicial Review* (pts. 1-2), 71 HARV. L. REV. 401, 769 (1958).

³² This is especially so since the attorney general of California admitted that *Worldwide Church* is not a unique case for his jurisdiction. Brief of Amici Curaie at 7-8, 444 U.S. 883 (1979).

RECEIVERSHIP IN THE NONPROFIT CONTEXT

Receivership developed in the courts of equity³³ and was discretionary with the chancellor;³⁴ it has never been an end in itself.³⁵ As a representative of the court,³⁶ the receiver is appointed to "hold, manage, control and deal with the property which is the subject matter of, or involved in, the controversy."³⁷ Because the remedy is radical, and involves the taking of property, the court must assure itself that no other adequate remedy exists.³⁸

California regulates the appointment of receivers by statute.³⁹ This statute, in keeping with the drastic nature of the remedy, is strictly construed by the courts.⁴⁰ Generally, a precondition to the appointment of a receiver is an adversary hearing⁴¹ at which the proponent of the action must meet a *prima facie* burden⁴² of proving waste, loss or destruction.⁴³ The *ex parte* appointment of a receiver is, however, permitted.⁴⁴ Though courts once held that the proponent of an *ex parte* order had to meet a more rigorous standard than the proponent of the typical order with notice,⁴⁵ recent cases suggest that the same standard applies in both cases.⁴⁶ Certain statutory safeguards are imposed in an *ex parte* pro-

³³ 1 R. CLARK, *supra* note 13, § 46; *see* *Davies v. Ramsdell*, 40 Cal. App. 432, 183 P. 702 (1919). *See generally* J. POMEROY, *EQUITY JURISPRUDENCE* §§ 1330-1336 (4th ed. 1919).

³⁴ 1 R. CLARK, *supra* note 13, § 53; J. POMEROY, *supra* note 33, § 1331; *see* *Morand v. Superior Court*, 38 Cal. App. 3d 347, 113 Cal. Rptr. 281 (1974).

³⁵ 1 R. CLARK, *supra* note 13, § 48; *see* *Associated Creditors' Agency v. Wong*, 216 Cal. App. 2d 61, 30 Cal. Rptr. 705 (1963).

³⁶ 1 R. CLARK, *supra* note 13, § 35.

³⁷ J. POMEROY, *supra* note 33, § 1330.

³⁸ *Id.* § 1331; *see* *Jackson v. Jackson*, 253 Cal. App. 2d 1026, 62 Cal. Rptr. 121 (1967); *Cohen v. Herbert*, 186 Cal. App. 2d 488, 8 Cal. Rptr. 922 (1960); *Rogers v. Smith*, 76 Cal. App. 2d 16, 172 P.2d 365 (1946); *Breedlove v. J.W. & E.M. Breedlove Excavating Co.*, 56 Cal. App. 2d 141, 132 P.2d 239 (1942).

³⁹ *See* CAL. CIV. PROC. CODE § 564 (West 1979).

⁴⁰ *See, e.g.,* *Turner v. Superior Court*, 72 Cal. App. 3d 804, 140 Cal. Rptr. 475 (1977); *Stock & Bond Guar. Co. v. Superior Court*, 108 Cal. App. 360, 291 P. 589 (1930).

⁴¹ *Huellmantel v. Huellmantel*, 125 Cal. 583, 57 P. 582 (1899).

⁴² *See* 1 R. CLARK, *supra* note 13, § 55; *accord*, *Ribero v. Callaway*, 87 Cal. App. 2d 135, 196 P.2d 109 (1948); *Copper Hill Mining Co. v. Spencer*, 25 Cal. 11 (1864). *But see* *Moore v. Oberge*, 61 Cal. App. 2d 216, 142 P.2d 443 (1943) (requiring a preponderance of the evidence).

⁴³ 1 R. CLARK, *supra* note 13, § 54.

⁴⁴ CAL. R. CT. 238.

⁴⁵ For an *ex parte* order, an irreparable injury, *Venza v. Venza*, 94 Cal. App. 2d 878, 211 P.2d 913 (1949); *Tyler v. Park Ridge Country Club*, 103 Cal. App. 117, 284 P. 247 (1930), and an occurrence of the greatest emergency, *Sunset Farms, Inc. v. Superior Court*, 9 Cal. App. 2d 389, 50 P.2d 106 (1935); *Tyler v. Park Ridge Country Club*, 103 Cal. App. 117, 284 P. 247 (1930), are required. Allegations based upon belief and information were generally found insufficient. *Golden State Glass Corp. v. Superior Court*, 13 Cal. 2d 384, 90 P.2d 75 (1939).

⁴⁶ "If it appears that the party seeking the appointment has at least a probable right or interest in the property sought to be placed in receivership and that the property is in danger of destruction, removal or misappropriation, the appointment of a receiver will not

ceeding.⁴⁷ However, the effectiveness of these safeguards must be questioned, especially in the nonprofit realm.⁴⁸

Courts have been reluctant to impose the radical remedy of receivership where corporations have been defendants. Shareholders' allegations of fraud and mismanagement which were based upon information and belief have typically been insufficient to warrant the appointment of a receiver.⁴⁹ Even when specifics are alleged, the court may scrutinize those specifics and find them wanting.⁵⁰ The test, at least for a profit corporation, requires injury to a creditor⁵¹ or shareholder,⁵² as well as in-

be disturbed on appeal." *Maggiore v. Palo Alto Inn, Inc.*, 249 Cal. App. 2d 706, 710, 57 Cal. Rptr. 787, 791 (1967). The opinion in *Maggiore* is notable because the court upheld an ex parte appointment where "reasonable minds might differ," *id.* at 711, 57 Cal. Rptr. at 791, and where the proponent had only a "probable interest," *id.* Absent from *Maggiore* is the typical hyperbole of "irreparable injury" and "greatest emergency." Perhaps this deletion is no great loss. Nevertheless, if the language is symbolic, its omission may constitute some loss. Interestingly, similar hyperbole is found in the property law of adverse possession where adjectives such as notorious, continuous, adverse, hostile and exclusive are used. In both receivership and adverse possession the court is concerned with depriving a party of his property. Therefore, the use of such language may symbolize the egregious nature of an action which would potentially infringe upon a constitutional right; if so, its loss may result in courts proceeding less cautiously.

⁴⁷ The ex parte proponent is required to post a bond

with sufficient sureties, in an amount to be fixed by the court, to the effect that the applicant will pay to the defendant all damages he may sustain by reason of the appointment of such receiver and the entry by him upon his duties, in case the applicant shall have procured such appointment wrongfully, maliciously, or without sufficient cause; and the court may, in its discretion, at any time after said appointment, require an additional undertaking.

CAL. CIV. PROC. CODE § 566 (West 1979). To a lesser extent, the possibility of appeal of a receivership appointment can serve as a safeguard, *id.* § 904.1(g) (West 1980), as can the posting of a bond to prevent the imposition of a receivership, *id.* § 917.5. See note 24 & accompanying text *supra*.

⁴⁸ The rights to appeal the appointment of a receiver and to post a bond to prevent imposition of a receiver are minimal safeguards and obviously after the fact. The defendant in an ex parte action may have the receivership removed either by posting a bond, by prevailing on an interlocutory appeal or by both. Even so, however, the defendant may not be protected by § 566 unless the proponent has acted wrongfully, maliciously or without sufficient cause or unless the damage to the defendant can be quantified with sufficient precision. Such precise quantification of damages may be impossible where the harm is to a defendant's good name or to a firm's good will. In the realm of nonprofit corporations or unincorporated associations, the product of the corporation or association tends to be an idea or a value in contrast to a salable product, commodity or service such as in a business enterprise. Without a product, commodity or service, the nonprofit, to a greater extent than does the business organization, relies upon its good name and the good will it has engendered. Without a balance sheet which will unequivocally measure the injury done by the receivership, the nonprofit may have a difficult time showing damages.

⁴⁹ See, e.g., *Mason v. San-Val Oil & Water Co.*, 1 Cal. 2d 670, 36 P.2d 616 (1934).

⁵⁰ See, e.g., *Presidio Mining Co. v. Overton*, 270 F. 388 (9th Cir.), *cert. denied*, 256 U.S. 694 (1921).

⁵¹ See, e.g., *Stock & Bond Guar. Co. v. Superior Court*, 108 Cal. App. 360, 291 P. 589 (1930).

⁵² See, e.g., *Mason v. San-Val Oil & Water Co.*, 1 Cal. 2d 670, 36 P.2d 616 (1934).

jury to the corporation itself.⁵³ Thus, that a corporation is a "going concern" may be conclusive evidence in the eyes of the court that the corporation has not been injured⁵⁴ and that a receivership should not be imposed.

Equity's use of this "going concern" test as a rule of thumb probably should not be questioned where the defendant is a public issue corporation. While the test may have some value where the defendant is a close corporation, other considerations such as family ties may be equally significant.⁵⁵ When, however, the defendant is a nonprofit corporation, an entity whose purpose disavows the ordinary balance sheet understanding of a going concern, the inappropriateness of the going concern test becomes obvious.⁵⁶ The going concern test undoubtedly reflects a concern of creditor protection, but it does not stretch the imagination in the least to postulate a nonprofit which fails the balance sheet test and yet whose creditors feel not at all threatened because they have identified with the qualitative goals of the nonprofit.

Equally as important as the question of the appropriate candidate for a receivership is the question of who has standing to apply for a receivership. Originally, California was persuaded that the proponent needed to demonstrate some right or interest in the property to be subjected to the receivership.⁵⁷ Recently, this standard has been relaxed and the appointment of a receiver is now upheld if the party seeking the appointment has at least a *probable* right or interest in the property and there is also a danger of destruction or misappropriation.⁵⁸ This relaxation of the standard can be seen as paralleling courts' expansion of the remedy's scope to cover personal or constitutional rights as well as property rights.⁵⁹

⁵³ "Internal dissensions deadlocking the corporation or frustrating it or threatening its purposes and objects, official breaches of trust, mismanagement and waste, are generally regarded as grounds, according to usages of equity, for a receivership to protect rights." *Misita v. Distillers Corp.*, 54 Cal. App. 2d 244, 251, 128 P.2d 888, 892 (1942).

⁵⁴ "The appointment of a receiver is a drastic remedy and is one which should not be invoked unless there is an actual or threatened cessation or diminution of the business." *In re Jamison Steel Corp.*, 158 Cal. App. 2d 27, 35, 322 P.2d 246, 250 (1958). "Stronger proof is essential to justify a receivership where specific and detailed evidence that the corporation's business is being successfully conducted at a profit is presented in opposition thereto." *Golden State Glass Corp. v. Superior Court*, 13 Cal. 2d 384, 396, 90 P.2d 75, 81 (1939). Where a corporation may be no more than an alter ego, e.g., *Sunset Farms, Inc. v. Superior Court*, 9 Cal. App. 2d 389, 50 P.2d 106 (1935), or where it has been formed to deprive a plaintiff of her rights, e.g., *Patents Process, Inc. v. Superior Court*, 101 Cal. App. 541, 282 P. 21 (1929), no such reluctance has been shown.

⁵⁵ 1 F. O'NEAL, *CLOSE CORPORATIONS* § 1.07 (2d ed. 1971).

⁵⁶ See note 48 *supra*.

⁵⁷ See, e.g., *Takeba v. Superior Court*, 43 Cal. App. 469, 185 P. 406 (1919).

⁵⁸ E.g., *Armbrust v. Armbrust*, 75 Cal. App. 2d 272, 171 P.2d 75 (1946).

⁵⁹ Note, *Equitable Remedies: An Analysis of Judicial Utilization of Neoreceiverships to Implement Large Scale Institutional Change*, 1976 WIS. L. REV. 1161, 1173 (1976); see Note,

The property interest test for determining whether a proponent has standing to express concern about the balance sheet of the corporation and to claim injury when the balance sheet is precarious or reflects insolvency, should be seen as complementing the going concern test by which an appropriate receivership candidate is ascertained. Creditors of the corporation would obviously be potential plaintiffs, but even their interest may not be sufficient to warrant the appointment of a receiver.⁶⁰ Shareholders are in a preferred position as potential plaintiffs and may prevail⁶¹ if their complaints are based upon more than mere "information and belief."⁶² An involuntary dissolution action may also be commenced against a corporation by the attorney general⁶³ who may request the appointment of a receiver.⁶⁴ The only other proponent with standing is the court itself which may appoint a receiver on its own motion, but such action is extremely rare.⁶⁵ The obvious conclusion to be drawn from courts' limited recognition of potential plaintiffs where a corporation is a defendant is that equity's admonition that the proponent of the receivership motion have an interest in the property involved⁶⁶ is taken very seriously. A creditor does not, properly speaking, have an interest in the corporate property save as that property may be security for a debt. The state does not, properly speaking, have an interest in corporate property unless state law has been violated. Conversely, the shareholder clearly has such a property interest.

Just as the going concern test is inappropriate in the nonprofit context, so too is the property interest test for standing. Typically, a member of a nonprofit corporation does not own shares. Even where there has been an economic investment and shares have been issued, the member cannot expect an economic return on his investment. When members of a nonprofit corporation are unsuccessful in their attempt to get a receiver appointed, it is often because of the difficulty of demon-

Appointment of an Equitable Receiver in Pennsylvania: An Unusual Remedy for an Extraordinary Situation, 78 DICK. L. REV. 536 (1974).

⁶⁰

[I]t is settled law that courts have no power at the instance of a mere creditor to appoint a receiver for a corporation, and thus virtually to dissolve it and usurp the powers of its directors, until he shall first have reduced his claim to a judgment and shall have exhausted his legal remedies.

Stock & Bond Guar. Co. v. Superior Court, 108 Cal. App. 360, 362-63, 291 P. 589, 590 (1930).

⁶¹ "[B]eyond question a court of equity has power to appoint a receiver in a stockholder's suit for the purpose of preserving the assets of a corporation and [preventing] irreparable loss or injury pending suit." *Misita v. Distillers Corp.*, 54 Cal. App. 2d 244, 250, 128 P.2d 888, 892 (1942).

⁶² See, e.g., *McCasin v. Kenney*, 100 Cal. App. 2d 87, 223 P.2d 94 (1950).

⁶³ CAL. CORP. CODE § 1801 (West 1977).

⁶⁴ *Id.* § 1803.

⁶⁵ See, e.g., *Venza v. Venza*, 94 Cal. App. 2d 878, 211 P.2d 913 (1949) (divorce proceeding).

⁶⁶ See J. POMEROY, *supra* note 33, §§ 1332-1334.

strating irreparable injury to a property interest.⁶⁷ This is not to say that the members have lacked standing to sue such corporations;⁶⁸ rather, where members have brought actions requesting receiverships, that remedy may be thought inappropriate because of the lack of a property interest. In contrast, when the attorney general has acted pursuant to his statutory authority, receivers have been appointed.⁶⁹

Statutory authority exists in California for the attorney general to bring an action against either a profit⁷⁰ or a nonprofit corporation.⁷¹ Attorneys general have frequently exercised this authority in the case of nonprofits.⁷² The explanation for this frequency of state action may be found in the property interest test. Since, by definition, there cannot be a traditional property interest in the nonprofit context, a standing void is created. Into this void the attorney general steps to bring an action. It is, however, begging the question to say that the attorney general must act because of the void, for it exists only because the inappropriate property interest test for standing is applied to the nonprofit.

Underlying the property interest standing test there appears to be a common sense economic presupposition that those who hold an economic interest will readily and forcefully argue their rights to protect that interest. Conversely, it may be contended that absent the compelling interest of personal financial loss, individual members of nonprofit corporations will be reluctant to initiate court proceedings to forestall fraud, mismanagement or waste.⁷³ More than this is needed, however, to deny nonprofit members access to the courts. It is both circular and nonsensical to argue that because members of nonprofits lack a property interest they will be reluctant to litigate, and then to deny the receivership remedy to a plaintiff who is eager to litigate. Moreover, mere reticence to litigate will not, by itself, justify the state's decision to stand in place of reluctant plaintiffs; some state interest must also be present.

⁶⁷ See, e.g., *Starbird v. Lane*, 203 Cal. App. 2d 247, 21 Cal. Rptr. 280 (1962); *Tyler v. Park Ridge Country Club*, 103 Cal. App. 117, 284 P. 247 (1930).

⁶⁸ See *Wheelock v. First Presbyterian Church*, 119 Cal. 477, 51 P. 841 (1897) (members, not trustees alone, have standing).

⁶⁹ See, e.g., *People v. Christ's Church of the Golden Rule*, 79 Cal. App. 2d 858, 181 P.2d 49 (1947).

In California, the general problem of members lacking standing may now be corrected by a new statute which allows derivative actions. See CAL. CORP. CODE § 5710 (West Supp. 1979). This addition, however, would seem to point to a diminished need for state involvement while the new statute concomitantly seems to increase the authority of the attorney general. See note 80 *infra*.

⁷⁰ CAL. CORP. CODE § 1801 (West 1977).

⁷¹ *Id.* § 9505 (West Supp. 1979) (repealed 1980).

⁷² See note 32 & accompanying text *supra*.

⁷³ See generally A. HIRSCHMAN, *EXIT, VOICE AND LOYALTY* (1970).

A more plausible explanation for the frequency of state actions against nonprofits is the charitable purpose frequently professed by nonprofit corporations. Where a nonprofit corporation exists for general religious, educational or eleemosynary reasons, it is, arguably, the people of the state who are the beneficiaries of a trust. Thus, the state interest being vindicated when the attorney general brings an action is probably not that of the members, but that of the original donors and present beneficiaries:

The public benefits arising from the charitable trust justify the selection of some public official for its enforcement. Since the attorney general is the governmental officer whose duties include the protection of the rights of the people of the state in general, it is natural that he has been chosen as the protector, supervisor, and enforcer of charitable trusts⁷⁴

A pragmatic argument reaching the same result has been stated with some precision:

[N]either the settlor nor his heirs can bring an action to enforce a charitable trust unless he has reserved a power to do so. . . .

[T]he beneficiaries of a charitable trust are unknown and therefore lack the necessary interest to bring suit to enforce the trust. . . .

. . . .

Thus it is apparent that parties other than the attorney general only infrequently have sufficient interest to bring a suit to enforce a charitable trust.⁷⁵

The charitable trust doctrine is a legal fiction,⁷⁶ deeply entrenched in California law⁷⁷ and formerly codified in the Nonprofit Corporations Code.⁷⁸ The new Nonprofit Corporation Code omits the charitable trust theory from the statutory language authorizing action by the attorney

⁷⁴ G. G. BOGERT & G. T. BOGERT, *LAW OF TRUSTS AND TRUSTEES* § 411, at 409 (2d rev. ed. 1977). This is really an argument for the accountability of nonprofit corporations. A discussion, however, of standards and devices of accountability is beyond the scope of this note.

⁷⁵ Gray, *State Attorney General—Guardian of Public Charities???*, 14 CLEV.-MAR. L. REV. 236, 239 (1965) (footnotes omitted).

⁷⁶ See Sutter, *Death of Charitable Trust Corporation Law*, 20 CLEV. ST. L. REV. 233, 236 (1971).

⁷⁷

The state, as *parens patriae*, superintends the management of all public charities or trusts, and, in these matters acts through her attorney general. Generally speaking, such an action will not be entertained at all unless the attorney general is a party to it. Such was the rule at common law, and it has not been changed in this state. Even in those states, such as Massachusetts, where, by special statute, the attorney general is instructed to prosecute such actions, it is declared that the statute does not narrow or diminish in this regard the common law powers incident to the office.

People *ex rel.* Ellert v. Cogswell, 113 Cal. 129, 136, 45 P. 270, 271 (1896) (citation omitted). For a more complete discussion of the charitable trust theory, see Brown v. Memorial Nat'l Home Found., 162 Cal. App. 2d 513, 329 P.2d 118 (1958).

⁷⁸ See note 12 & accompanying text *supra*.

general.⁷⁹ Nonetheless, the extensive power of the attorney general as it existed under the prior codification remains undiminished. Indeed, since the legislative history of the new Code suggests that the attorney general shall have his new specific powers in addition to his common law power,⁸⁰ and since the charitable trust doctrine is part of his common law power,⁸¹ it may be argued that the charitable trust doctrine is still viable in California.⁸² The continuation of this doctrine is regrettable not simply because this is an age which delights in debunking legal fictions, but more importantly because of the constitutional questions raised when the state attempts to regulate nonprofit corporations which are also churches.

⁷⁹ See CAL. CORP. CODE § 9230 (West Supp. 1980).

⁸⁰ "In addition to general common law powers over charitable institutions, the Attorney General now has specific statutory authority to supervise charitable corporations. This authority is continued in the proposed law." Recommendation Relating to Nonprofit Corporation Law, 13 CAL. L. REVISION COMM'N REP. 2265 (1976) (footnotes omitted).

Where any assets are subject to a charitable trust and the transaction is not in the usual and regular course of corporate activities, the proposed law requires the nonprofit corporation to give written notice to the Attorney General before the transaction is consummated. This will facilitate performance of the Attorney General's duty to supervise charitable property.

Id. at 2267; see *id.* at 2268.

⁸¹ See note 77 *supra*.

⁸² See Note, *Does Court Ordered Receivership Breach the Wall of Separation Between Church and State?*, 6 W. ST. U.L. REV. 269 (1979).

CAL. CORP. CODE §§ 9142, 9230 and 9690 were recently amended out of a concern for infringement upon free exercise of religion. Ch. 1324, 1980 Cal. Stats. 5082 (1980). This expression of legislative will, effective June 1, 1981, prompted the California attorney general to dismiss the action against the Worldwide Church of God as well as actions pending against other religious corporations. As amended, § 9230 prohibits the attorney general from bringing actions against religious corporations unless there has been a public solicitation and fraud is suspected. The amendments to §§ 9142 and 9690 seek to fill the accountability and deterrence voids created by the new § 9230, by granting standing to members and former members of the corporation and by encouraging criminal courts to impose restitution sentences where persons are convicted of fraud in the name of religion. While the legislature's grant of standing to members and to former members is certainly a welcome change, see note 74 & accompanying text *supra*, any enthusiasm must be tempered by three lingering concerns. First, § 9230(d) makes it clear that the charitable trust theory remains a viable theory where fraud is alleged. Second, since §§ 9511 and 9512 permit the religious corporation by its articles or bylaws to restrict a member's right to inspect membership lists and corporate records, the standing victory won by members in § 9142 may be a hollow one without a concomitant relaxation by courts of the standard for judging the sufficiency of initial pleadings. If, for example, a pleading based on information and belief will not be sustained where the corporation's articles or bylaws deny the member access to the records from which he might derive knowledge, his new-found standing will avail him little. See notes 49, 62 & accompanying text *supra*. Third, the cosmetic changes effected by the California legislature do not address the underlying free exercise problem which exists where the corporate entity is not a church per se, but a church school or foundation, not properly incorporated under § 9111. See notes 101-04 & accompanying text *infra*. While the attorney general in *Worldwide Church* has dismissed as to all defendants, including the college and the foundation, the new legislation is silent on this point.

FIRST AMENDMENT CONSIDERATIONS

The applicability of the first amendment's freedom of speech and freedom of association clauses to business corporations has already been recognized. *First National Bank v. Bellotti*⁸³ established that state corporation laws cannot abridge freedom of speech.⁸⁴ *Bellotti* held that a state statute which prohibited a banking association from lobbying on an issue not materially affecting any of the property, business or assets of the corporation deprived the corporation of freedom of speech.⁸⁵ While *Bellotti* dealt with a business corporation, this decision should also be applicable to nonprofits, at least to the extent of the lobbying limitations imposed by the Internal Revenue Code.⁸⁶ *NAACP v. Alabama*⁸⁷ established that enforcement of state nonprofit corporation laws cannot justify abridging freedom of association rights.⁸⁸ *NAACP* held that Alabama's interest in determining whether the nonprofit was conducting intrastate business in violation of state law would not be substantially advanced by the production of membership lists, and that such a mandate would impinge upon the constitutional guarantee of freedom of association.⁸⁹ Analytically, if state corporation laws cannot infringe upon the free speech and free association clauses, it should follow that state corporation laws also cannot infringe upon other fundamental rights.

*Worldwide Church of God v. Superior Court*⁹⁰ poses two first amendment questions. The first of these is whether the appointment of a receiver based upon charitable trust theory violates the first amendment's prohibition against establishment of religion; and the second is whether a receiver's extensive involvement in church affairs violates the first amendment's guarantee of free exercise of religion.⁹¹

⁸³ 435 U.S. 765 (1978).

⁸⁴ *Id.* at 776.

⁸⁵ *Id.* at 784.

⁸⁶ See I.R.C. § 501(h). I.R.C. § 501(h) might be subject to a first amendment challenge similar to the one which resulted in the Massachusetts statute being held constitutionally infirm.

⁸⁷ 357 U.S. 449 (1958).

⁸⁸ *Id.* at 466.

⁸⁹ *Id.* at 464-66.

⁹⁰ *People v. Worldwide Church of God*, No. C 267 607 (L.A. Super. Ct., filed Jan. 2, 1979), *mandamus denied*, *Worldwide Church of God v. Superior Court*, No. 31091 (Cal. March 22, 1979), *cert. denied*, 444 U.S. 883 (1979), *cert. denied*, 100 S. Ct. 1846 (1980), *cert. denied*, 100 S. Ct. 2974 (1980) (dismissed from L.A. Super. Ct., Oct. 16, 1980).

⁹¹ *Worldwide Church* also poses two additional constitutional questions: whether the use of different standards in receivership cases when business and nonprofit corporations are assessed for, or subjected to, receivership violates equal protection guarantees; and whether the appointment of a receiver with powers such as those of the receiver in this case abridges fourth amendment guarantees against unreasonable search and seizure. The vitality of the second of these additional questions is substantiated by the church's subsequent petition for certiorari on fourth amendment grounds. See 49 U.S.L.W. 3201 (U.S. Aug. 8, 1980) (No. 80-197). However, certiorari was denied. 100 S. Ct. 1846 (1980).

The Establishment Issue

The establishment clause⁹² stands for the proposition that the government shall not become excessively entangled in religious affairs.⁹³ Entanglement can be either administrative or political.⁹⁴ Administratively, the prohibition is against excessive governmental surveillance of religious affairs and improper resolution of religious disputes. Politically, the caution is against advancing the cause of one religion as opposed to that of any other.⁹⁵

The appointment of a receiver for church property may pose problems under both the administrative and the political thrusts of the establishment clause. The first potential problem is apparent. As an agent of the court which is an institution of the state, the receiver would be in control of church property; the receiver can dispose of the property or acquire additional property.⁹⁶ In this situation, the state, for all practical purposes, is operating the church and, in so doing, acting to establish a religion in violation of the establishment clause. The second potential problem may not be immediately apparent, as it is grounded in the problem of standing. This problem results when a state asserts an independent interest in the cause of action on the basis of a charitable trust or similar theory. Utilizing a charitable trust rationale, the state may contend that the assets of the church are held in trust for the people of the state and that the state has powers of supervision and intervention as *parens patriae*. If such a theory is used, continuous entanglement is the unfortunate, but logical, result.

Receivers: Conservers of Secular Property

The charge that the mere appointment of a receiver constitutes a constitutionally prohibited establishment of religion can be parried either by denying that the state is involved in religion or by denying that the state's involvement is impermissible.⁹⁷ The most direct way to deny

⁹² U.S. CONST. amend. I.

⁹³ It is conceded that total separation of church and state is impossible; thus, the issue is one of determining whether the interaction is excessive. See *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970).

⁹⁴ L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 866-80 (1978).

⁹⁵ *Id.* Excessive surveillance also impinges upon a believer's free exercise. Similarly, giving an advantage to one church, while withholding the same advantage from another, inhibits the second's free exercise vis a vis the first. Thus, even in theory, a total separation of the establishment from the free exercise clause is impossible. See *Walz v. Tax Comm'n*, 397 U.S. 664, 668-69 (1970).

⁹⁶ CAL. CIV. PROC. CODE § 568 (West 1979).

⁹⁷ A third way to refute this establishment argument emphasizes form over substance, claiming that the receiver is not, properly speaking, a representative of the state and, therefore, no state establishment can be found. This position dubs the receiver a "representative," not an "agent," of the court. Since

state involvement in religion is to divide the life of a religious organization into secular and religious spheres, and to give the receiver power over only secular activities, leaving the religious in the hands of the appropriate ecclesiastical authorities. This conceptual dichotomy might be termed the dual-separate entity theory. Such a dichotomy is implicit in the receivership order in *Worldwide Church*,⁹⁸ and recognizes that the corporate existence of a church is distinct and separable from its spiritual life. Churches incorporate for the pragmatic reasons of holding property and limiting liability. These pragmatic reasons cannot be confused with worship.

The distinction between the corporate and the religious existence of a church was recently noted in *Barr v. United Methodist Church*.⁹⁹ There, the defendant church objected to service of process, claiming that it was not a jural entity capable of being sued. The court affirmed a dual-separate entity theory, reasoning that to hold the corporate entity liable would neither "affect the distribution of power or property within the denomination" nor "modify or interfere with the modes of worship affected by Methodists."¹⁰⁰ Applying this reasoning to the *Worldwide Church* situation, when a receiver is appointed he is only a receiver of the corporate property, and his appointment leaves the religious life of the church intact. To the extent that there is state involvement in the church entity, this involvement extends no further than the church's secular life. Moreover, normally the corporate life of an organization

a court of law or equity cannot delegate its authority . . . the doctrine of agency, can not apply with all its implications to the relationship of the court and its receiver or the receiver and the parties to the suit, therefore, the receiver can not be in the full sense of the word an agent of the court.

1 R. CLARK, *supra* note 13, § 36 (footnotes omitted).

⁹⁸ The receiver took control of all church assets and was directed to carry out all of the activities and operation of the church, *see* note 15 & accompanying text *supra*, but he was not "to interfere in any way with the ecclesiastical functions of the Church (as distinguished from the College or the Foundation)," *see* note 21 *supra*. Note that the court's secular/religious dichotomy seems to apply only to the church, and that no ecclesiastical functions of the college or foundation appear to be recognized. This reasoning is highly questionable inasmuch as the *raison d'être* for religious schools and foundations is evangelism and service as the religion's doctrine defines these terms.

Wheelock v. First Presbyterian Church, 119 Cal. 477, 51 P. 841 (1897), was a suit brought by dissident church members, challenging the right of the presbytery to divide a local church and its assets between the two resulting congregations. In suggesting in dictum that the presbytery had the power to disband the church, but lacked the power to divide the assets, the California Supreme Court stated:

The corporation is a subordinate factor in the life and purposes of the church itself. A religious corporation . . . is something peculiar to itself. Its function and object is to stand in the capacity of an agent holding the title to the property, with power to manage and control the same in accordance with the interest of the spiritual ends of the church.

Id. at 483, 51 P. at 843.

⁹⁹ 90 Cal. App. 3d 259, 153 Cal. Rptr. 322 (1979).

¹⁰⁰ *Id.* at 274, 153 Cal. Rptr. at 332.

which has been placed in receivership will continue under the direction of its own corporate officers even though the receiver may be present to ensure the preservation of corporate property.¹⁰¹ Where corporate officers remain in office and the receiver is purely an overseer of the secular life of the church corporation, state involvement would seem very slight.

The legitimacy, however, of the distinction between the corporate life of the church and its religious life is highly questionable.¹⁰² Economic considerations certainly reveal the theoretical weakness of the dichotomy. Property is power, and there is no reason for a church to own property save for its religious purposes. Thus, the power to control the disposition or use of property is the power to further or to frustrate religious purposes.¹⁰³ Doubtful as it is that the dual-separate entity theory is viable in the abstract, it is even more doubtful that the theory is a workable one, amenable to practical application. A basic reason for this is that the inquiry which is essential to distinguish the religious from the secular entails the inquiry into what is doctrinally essential to the religion. This inquiry is, however, constitutionally prohibited. Since even the secular life of a church is still part of the life of a church, the appointment of a receiver must pass the current test for any potential establishment clause violation as announced in *Lemon v. Kurtzman*.¹⁰⁴

Lemon invalidated state statutes which authorized salary supplements to teachers in parochial schools and the purchase of educational services from nonpublic schools.¹⁰⁵ To meet the *Lemon* establishment clause test, a state statute must have been enacted with a secular purpose, neither advance nor inhibit religion and not excessively entangle the state in church affairs.¹⁰⁶ Viewed in the light most advantageous to the state, receivership statutes meet the first requirement of the *Lemon* test because they have the purpose of preserving the property at issue in litigation.¹⁰⁷ To the extent that the statutes can be invoked by plaintiff churches to protect their own claims, these statutes are evenhanded in their operation.¹⁰⁸ Thus, the second prerequisite of validity is satisfied in that receivership statutes neither advance nor inhibit religion, but merely maintain the status quo until trial. The activities of a receiver, such as those of the receiver in *Worldwide Church*, do,

¹⁰¹ But see *Sunset Farms, Inc. v. Superior Court*, 9 Cal. App. 2d 389, 50 P.2d 106 (1935).

¹⁰² See note 98 *supra*.

¹⁰³ See McKeag, *The Problem of Resolving Property Disputes in Hierarchical Churches*, 48 PA. B. ASS'N Q. 281 (1977).

¹⁰⁴ 403 U.S. 602 (1971).

¹⁰⁵ *Id.* at 609, 611.

¹⁰⁶ *Id.* at 612-13.

¹⁰⁷ See note 37 & accompanying text *supra*.

¹⁰⁸ Cf. *Gillette v. United States*, 401 U.S. 437 (1971) (dictum) (conscientious objector statute cannot establish traditional religion).

however, violate the third prong of the *Lemon* test. There is excessive governmental entanglement in *Worldwide Church* and similar situations, even though the statute has a secular purpose and a neutral practical effect.

This conclusion follows from *New York v. Cathedral Academy*.¹⁰⁹ In that case the school relied on a New York statute authorizing payments to nonpublic schools for expenses incurred similar to the statute declared unconstitutional in *Lemon*. Invalidating the New York statute, the Supreme Court noted that the New York Court of Appeals had construed it as requiring a detailed audit to substantiate all claims submitted, and then proceeded to reason:

But even if such an audit were contemplated, we agree with the appellant that this sort of detailed inquiry into the subtle implications of in-class examinations and other teaching activities would itself constitute a significant encroachment on the protections of the First and Fourteenth Amendments. In order to prove their claims for reimbursement, sectarian schools would be placed in the position of trying to disprove any religious content in various classroom materials. In order to fulfill its duty to resist any possibly unconstitutional payment . . . the State as defendant would have to undertake a search for religious meaning in every classroom examination offered in support of a claim. And to decide the case, the Court of Claims would be cast in the role of arbiter of the essentially religious dispute.¹¹⁰

Directing a church corporation receiver "to employ . . . accountants, auditors, and attorneys to conduct a thorough audit of the financial and business dealings of the Church"¹¹¹ conflicts with *Cathedral Academy's* admonition that state examination of the records of a religious entity constitutes impermissible entanglement. The bookkeeper's intrusion in *Cathedral Academy* and in the receivership order in *Worldwide Church*¹¹² seems sufficient to make the former controlling. There is, however, more: both *Cathedral Academy* and *Worldwide Church* involve courts exercising their equitable powers. In the former, equity was prohibited from acting on behalf of a parochial school to mitigate the *actual* unfairness of denying the parochial school's reliance interest because so to act would excessively entangle church and state.¹¹³ In the

¹⁰⁹ 434 U.S. 125 (1977).

¹¹⁰ *Id.* at 132-33.

¹¹¹ Brief for Petitioner, *supra* note 14, app. E, at 31.

¹¹² *Cathedral Academy* also stands for disapproval of the receivership order's failure to recognize the ecclesiastical function of the college defendant in *Worldwide Church*. See notes 21 & 98 *supra*.

¹¹³ *Cathedral Academy* must be read not only in conjunction with *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (*Lemon I*), but also with *Lemon v. Kurtzman*, 411 U.S. 192 (1973) (*Lemon II*). *Lemon I* invalidated Rhode Island and Pennsylvania statutes authorizing purchase of services from parochial schools. *Lemon II* approved an order authorizing the distribution of funds by Pennsylvania to reimburse parochial schools for expenses incurred prior to *Lemon I*. In a four to three decision, with one concurrence, the four justice plurality accepted the

latter, equity sought to act to mitigate the *possible* unfairness to the interests of others via the appointment of a receiver. If equity is prohibited from acting to mitigate actual unfairness, equity would seem to be more forcefully prohibited from acting to mitigate possible unfairness.

The frequently criticized¹¹⁴ result of *Walz v. Tax Commission*¹¹⁵ buttresses the excessive entanglement conclusion reached in *Cathedral Academy*. In *Walz*, the Court upheld New York's tax exemption for religious properties used solely for religious worship. While property tax exemption would seem to establish religion, it does not prefer one church to another since the benefit is extended to all churches. More importantly, the Court reasoned that affording a tax exemption results in *less* entanglement than would taxing church property which would entail evaluating the property and perhaps instituting procedures for tax liens and foreclosures as well.¹¹⁶ "[E]xtensive state investigation into church operation and finances" is to be avoided.¹¹⁷ Thus, both *Cathedral Academy* and *Walz* support the contention that the establishment clause is violated by a neutral receivership statute which is applied to authorize extensive surveillance of a church's "secular" affairs. This is especially true since a purportedly neutral receivership remedy may be impossible to apply without involving excessive entanglement.¹¹⁸

reliance reasoning of the lower court in light of the one time nature of the payments. Four years later, in *Cathedral Academy*, six justices rejected the New York legislature's effort to protect the reliance interest of New York nonpublic schools. In a six to three decision, the majority explicitly rejected the *Lemon II* equity argument of reliance. 434 U.S. at 134. The Court's effort to distinguish *Lemon II* is unconvincing, practically speaking, and may stand for no more than the proposition that a legislature will not be allowed, in the face of an injunction, to bestow via statute, the equitable relief a court would grant by decree.

¹¹⁴ See, e.g., M. LARSON & C. LOWELL, *THE RELIGIOUS EMPIRE* (1976).

¹¹⁵ 397 U.S. 664 (1970).

¹¹⁶ *Id.* at 674.

¹¹⁷ *Id.* at 691 (Brennan, J., concurring).

Typically, establishment clause cases turn upon the presence of a statute which directly bears upon organized religion. See, e.g., *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (invalidating a statute allowing public purchase of educational services from parochial schools); *Gillette v. United States*, 401 U.S. 437 (1971) (upholding selective service regulation regarding conscientious objectors); *Walz v. Tax Comm'n*, 397 U.S. 664 (1970) (upholding religious property tax exemption); *Everson v. Board of Educ.*, 330 U.S. 1 (1947) (upholding a statute authorizing district boards of education to reimburse parents of parochial students for bus fares). Facially neutral statutes are commonly analyzed under the free exercise clause. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (compulsory school attendance statute); *Sherbert v. Verner*, 374 U.S. 398 (1963) (unemployment compensation statute); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (child labor statute). Nonetheless, the majority in *Walz* suggested that even a facially neutral statute may violate the establishment clause by its application: "Each value judgment under the Religion Clauses must . . . turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so." 397 U.S. at 669 (emphasis added).

¹¹⁸ Even if emphasis is improperly placed upon *Walz*' dictum, see note 117 *supra*, the very nature of a receivership would seem impermissible. Where personal property is the subject

Charitable Trust Theory: The Political Establishment of Religion

The charitable trust theory¹¹⁹ was invoked by California in *Worldwide Church* to justify state intervention in the affairs of a church in general and the appointment of a receiver in particular.¹²⁰ If this theory were taken literally, the state would have been in the position of arguing that it is continuously entangled in the work of the church; not temporarily involved during litigation, but continuously, as it functions as *parens patriae* at all times.¹²¹ This activity, as has been noted,¹²² is prohibited.

Much more serious, however, than any conceptual problems posed by the literal interpretation of a legal fiction are the difficulties encountered in the practical application of the charitable trust theory. California courts have claimed that

the acceptance of . . . assets [by a nonprofit] establishes a charitable trust for the declared corporate purposes as effectively as though the assets had been accepted from a donor who had expressly provided in the instrument evidencing the gift that it was to be held in trust solely for such charitable purposes.¹²³

of receivership, it may be possible for a receiver to act as a warehouseman and keep the property under lock and key. Such a situation, however, would be the exception rather than the rule. Most receivers, especially those of corporations, cannot avoid monitoring and examining accounts and records. *But see* Note, *supra* note 82, at 277-79.

¹¹⁹ The true ground [of charity law] is that the property given to a charity becomes in a measure public property, only applicable as far as may be, it is true, to the specific purposes to which it is devoted, but within those limits consecrated to the public use and become [*sic*] part of the public resources for promoting the happiness and well-being of the people of the State."

Late Corp. of Latter-Day Saints v. United States, 136 U.S. 1, 59 (1890).

¹²⁰ See text accompanying notes 14-15, *supra*. In addition to the charitable trust theory, attempts can be made to justify state examination of the affairs of nonprofits along two other lines. First, nonprofits fill roles in the community which otherwise would have to be filled by the state. Therefore, the nonprofit is really performing the job of the state. See generally *Walz v. Tax Comm'n*, 397 U.S. 664, 687 (1970) (Brennan, J., concurring); D. ROBERTSON, *SHOULD CHURCHES BE TAXED?* 192-93 (1968). Second, in recognition of their charitable services, nonprofits are frequently given tax exempt status. In addition to not being taxed on property or income, I.R.C. § 501, contributions to nonprofits may be deductible to the individual taxpayer, *id.* § 170(a). Thus, nonprofits are really operating with government dollars since the dollars with which they operate have been allowed to remain in the private or quasi-public sector only by the largesse of government. Regardless of their applicability to most nonprofits, the impropriety of these justifications where a church is the nonprofit should be obvious:

Government could provide or finance operas, hospitals, historical societies, and all the rest because they represent social welfare programs within the reach of the police power. In contrast, government may not provide or finance worship because of the Establishment Clause any more than it may single out "atheistic" or "agnostic" centers or groups and create or finance them.

Walz v. Tax Comm'n, 397 U.S. at 708-09 (Douglas, J., dissenting).

¹²¹ Continuous involvement would be difficult to accept even for the majority in *Lemon II* which observed that it was only ratifying a "cleanup" operation which would not recur. 411 U.S. at 202. See note 113 *supra*.

¹²² See notes 115-16 & accompanying text *supra*.

¹²³ *Pacific Home v. County of Los Angeles*, 41 Cal. 2d 844, 852, 264 P.2d 539, 543 (1953).

To ascertain whether those assets are being properly handled by the charitable trustees, the courts can inquire into whether the assets are being handled in accordance with the charity's bylaws.¹²⁴ This means that courts must interpret the purpose of a charity to insure that there is no departure from that purpose in contravention of the "terms" of the trust.¹²⁵ Where a church is concerned, however, such inquiry would parallel the inquiry necessitated by the implied trust doctrine declared unconstitutional in *Presbyterian Church v. Mary Elizabeth Blue Hull Presbyterian Church*.¹²⁶

Blue Hull was a church property dispute between rival factions of the same congregation. As a matter of Georgia law, church property was held subject to an implied trust; if there was a departure from the original doctrine of the church, the property was subject to forfeiture. Thus, Georgia courts were obligated from the outset in church property disputes to determine whether a departure from doctrine had occurred.¹²⁷ This departure from doctrine inquiry was found objectionable in light of the establishment clause.¹²⁸ Therefore, to comport with the Constitution and avoid impermissible interference with religion, courts that are called upon to resolve church property disputes are free to adopt any one of three approaches: they may enforce majority decisions where the church has a congregational polity or the decisions of the highest ecclesiastical authority where the church polity is hierarchical; they may rely upon "neutral principles of law," looking to deeds, reverter clauses and general state corporation law; or they may enforce state statutes which govern church property but which preclude interference in church doctrine.¹²⁹ Even where hierarchical churches are involved, it is now clear that courts need not blindly defer to ecclesiastical tribunals, but may invoke "neutral principles of law" in resolving the dispute.¹³⁰

Georgia's implied trust theory, invalidated by *Blue Hull*, is not discernibly different from California's charitable trust theory. The attorney general's ascertainment of whether he will bring a cause of action against the nonprofit church corporation necessitates the forbidden

¹²⁴ See, e.g., *Samoan Congregational Christian Church in the United States v. Samoan Congregational Christian Church of Oceanside*, 66 Cal. App. 3d 69, 135 Cal. Rptr. 793 (1977).

¹²⁵ This inquiry into purpose has prevented the closing of a religious hospital and the opening of neighborhood clinics in its stead, *Queen of Angels Hosp. v. Younger*, 66 Cal. App. 3d 359, 136 Cal. Rptr. 36 (1977), and declared unacceptable the distribution of assets elected by members of a dissolving local church. See note 133 & accompanying text *infra*.

¹²⁶ 393 U.S. 440 (1969); see *Jones v. Wolf*, 443 U.S. 595 (1979).

¹²⁷ See 393 U.S. at 443-44.

¹²⁸ *Id.* at 449-50.

¹²⁹ *Maryland & Va. Eldership of the Churches of God v. Church of God at Sharpsburg*, 396 U.S. 367, 368-70 (1970) (Brennan, J., concurring).

¹³⁰ *Jones v. Wolf*, 443 U.S. 595 (1979).

theological assessment of the church's neutral documents. The court's ascertainment of whether it will entertain the cause of action requires the same doctrinal inquiry. While legal fictions such as the charitable trust theory were a useful tool in years past for protecting minority rights,¹³¹ *Blue Hull* made it clear that they could no longer be used where the nonprofit is a church¹³² and that, in at least this area, legal theory had come of age.

It is apparent, however, that California courts have not recognized *Blue Hull* as controlling. This amnesia is illustrated not only by *Worldwide Church*, but also by a strain of other cases, the most notable being the voluntary dissolution proceeding of *In re Metropolitan Baptist Church of Richmond, Inc.*¹³³ Denying the unanimous petition of the church membership to distribute its assets among three Baptist churches, a Baptist seminary and a serviceman's center, the court looked to the avowed purpose in petitioner's articles of incorporation, namely, "founding and conducting . . . a Baptist church in Richmond . . . to preach and teach the Scriptures in that city in essential accord with the beliefs of fundamental Baptist churches."¹³⁴ The court ruled that one Baptist church was too distant, that a seminary was not a church and that the serviceman's center was both too distant and too secular. This determination, rationalized by the court as pursuant to "neutral principles of law,"¹³⁵ would have been impossible to make without asking which theological tenets are most central to being a Baptist—the analysis prohibited by *Blue Hull*.

Blue Hull's sequel, *Jones v. Wolf*,¹³⁶ gave unqualified affirmation to the neutral principles doctrine and recognized a corporate charter as a "neutral document."¹³⁷ Nevertheless, finding a neutral document is not the same as interpreting that document in light of the controversy:

In undertaking such an examination, a civil court must take special care to scrutinize the document in purely secular terms, and not to rely on religious precepts in determining whether the document indicates that the parties have intended to create a trust. [If religious

¹³¹ Sutter, *supra* note 76, at 236.

¹³² Even where the charity is not a church, the policy basis for invoking such theories may be questioned. "Today, many of the gifts for non-profit corporations are given by non-members, corporations, or with no limitations. In light of these gifts, it becomes difficult for courts to justify using an implied trust where the donor has made no specific request that the 'creed' of the corporation be continued." *Id.* For a discussion of the implied trust theory, see L. TRIBE, *supra* note 94, at 872-80.

¹³³ 48 Cal. App. 3d 850, 121 Cal. Rptr. 899 (1975).

¹³⁴ *Id.* at 855, 121 Cal. Rptr. at 902.

¹³⁵ See *id.* at 859, 121 Cal. Rptr. at 904.

¹³⁶ 443 U.S. 595 (1979).

¹³⁷ *Id.* at 602-04.

precepts are involved], then the court must defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body.¹³⁸

It is extremely unlikely that neither religious purposes nor doctrines would appear in the purpose clause of a religious organization's constitution or charter. Finding the "neutral" document is useless unless one understands what it means, and interpretation is necessary for understanding. Given the articles of incorporation at issue in *Metropolitan Baptist*, that court would minimally have had to reason that the congregational polity process by which Baptists make decisions is less essential to being a Baptist, and therefore more easily disregarded by courts, than other elements of the Baptist faith.

Although *Metropolitan Baptist's* dissolution action may be factually distinguishable from *Worldwide Church's* receivership action, the charitable trust theory provides the common denominator. *Metropolitan Baptist* can be understood as standing for the proposition that courts will not listen even to the express wishes of current and future contributors or members if a charitable trust has been imposed. *Worldwide Church* may illustrate the validity of this generalization in that the court affirmed the receiver's interception of a communication from the Pastor General to the membership and enjoined the defendants "from attempting to divert voluntary contributions from being sent . . . where the receiver could take possession of them."¹³⁹ The receiver's action raises questions of jurisdiction and authority beyond the scope of this note. It is sufficient to observe that if the theory to be invoked is the charitable trust theory, the receiver seems to have prevented contributors from impressing their contributions with their own wishes.

Together, *Metropolitan Baptist* and *Worldwide Church* pose the conundrum of how the charitable trust theory could ever allow a nonprofit church corporation to amend its articles of incorporation to avow a new purpose. If such an amendment is impossible because of the prior involvement of the state as *parens patriae*, the establishment clause is politically infringed. Indeed, the *parens patriae* rationale stands for a continuing involvement in the affairs of the church. If the impossibility of amending the articles is only a present impossibility due to the state's intervention at the time of suit, the infringement could more appropriately be characterized as one of the free exercise of religion.

The Free Exercise Issue

An act which establishes one individual's religion may infringe upon another individual's free exercise of a different religion.¹⁴⁰ For this

¹³⁸ *Id.* at 604.

¹³⁹ Brief for Petitioner, *supra* note 14, at 9.

¹⁴⁰ See note 95 *supra*.

reason, the free exercise discussion complements the preceding establishment discussion. Legislative acts which have had a minimal and indirect impact upon religion and whose purpose and primary impact lay elsewhere have been found to violate the free exercise clause.¹⁴¹ Thus, state corporation statutes which authorize state intervention into, or examination of, the affairs of churches in the form of receivership may violate the free exercise clause as applied.

The application of the receivership statute in *Worldwide Church* involved the appointment of a receiver who acted under the aegis of the court and thus had the imprimatur of the state.¹⁴² The petitioners alleged that the receiver laid off employees, including ministers; hired a disfellowshipped church member to work at church headquarters against the express beliefs of the church; and caused a financial loss resulting in the elimination or reduction of youth programs, educational programs, evangelistic efforts and travel subsidies to religious meetings.¹⁴³ If proven, these activities would clearly involve free exercise interests and raise free exercise clause questions.

To deprive an individual of his free exercise of religion is to deprive him of a fundamental first amendment right.¹⁴⁴ Such deprivation is only permissible if there is a compelling state interest.¹⁴⁵ Compelling interests have been found where the public health,¹⁴⁶ morality¹⁴⁷ and safety¹⁴⁸ have been at stake.¹⁴⁹

The freedom guaranteed to practice religion is not unlimited;¹⁵⁰ a two part balancing test has been utilized to determine whether a deprivation is permissible:

First, the persons claiming an exception from the regulation must show that it burdens the practice of their religion Second, the restriction on the free exercise of religion will be balanced against the importance of the state interest in the regulation. Even if the state interest appears to be of a greater magnitude [*i.e.*, a compelling interest], the regulation will be invalid unless it burdens religion no more than is necessary to promote the overriding secular interest. This "least restrictive means" test is merely another way of saying that an important state interest will not justify the limitation of the free exercise of religion unless an exemption for religiously

¹⁴¹ See note 117 & accompanying text *supra*.

¹⁴² See Brief for Petitioner, *supra* note 14, app. F.

¹⁴³ See note 27 *supra*.

¹⁴⁴ *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

¹⁴⁵ *Sherbert v. Verner*, 374 U.S. 398 (1963).

¹⁴⁶ See, *e.g.*, *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (compulsory vaccination statute).

¹⁴⁷ See, *e.g.*, *Reynolds v. United States*, 98 U.S. 145 (1879) (bigamy statute).

¹⁴⁸ See, *e.g.*, *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940) (solicitation statute).

¹⁴⁹ See C. ANTIEAU, T. BURKE & P. CARROLL, *RELIGION UNDER THE STATE CONSTITUTIONS* 65-99 (1965).

¹⁵⁰ See, *e.g.*, *Reynolds v. United States*, 98 U.S. 145 (1879).

motivated activity would unduly interfere with the achievement of that state interest.¹⁵¹

Early free exercise cases took a different approach. In accord with the once favored substantive due process analysis whereby the Court attempted to give specific content to general rights by looking to principles of natural law,¹⁵² the Court declared that some first amendment disputes involved proscribed activity "beyond the limit" of free exercise protection.¹⁵³ Bigamy¹⁵⁴ and fraud¹⁵⁵ were beyond the limits of the free exercise of religion clause even as the first amendment's guarantee of free speech did not extend to crying fire in a theater.¹⁵⁶ As balancing tests fall into disfavor, one might anticipate that the notion of a "limit" would gain some resurgence in free exercise cases.¹⁵⁷

The analysis of the potential problem posed by state receivership and intervenor statutes as applied to churches will differ little, if at all, under a balancing test or the concept of a "limit." For defendants in *Worldwide Church* to have prevailed under a balancing test, they would have had to show that the receivership statute or the charitable trust theory burdened their practice of religion. Assuming that showing, the burden would have shifted to the state to show its interest and its effectuation by the least restrictive means possible in terms of inhibiting

¹⁵¹ J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 879 (1978). The compelling state interest-least restrictive alternative test for the free exercise clause is first enunciated in *Sherbert v. Verner*, 374 U.S. 398 (1963). The fact that the statute in *Sherbert* was "religion blind" did not save it. L. TRIBE, *supra* note 94, at 852. "[F]ailure to accommodate religion when the government could substantially achieve its legitimate goals while granting religious exemptions has been disapproved as hostility toward religion rather than hailed as the essence of neutrality." *Id.* (footnote omitted).

¹⁵² See J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 151, at 385-91.

¹⁵³ Thus, in *Davis v. Beason*, 133 U.S. 333 (1890), an Idaho statute proscribing bigamy was upheld as applied to Mormons. The reasoning of Justice Field was categorical rather than syllogistic. "It was never intended or supposed that the amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society." *Id.* at 342. In *Cantwell v. Connecticut*, 310 U.S. 296 (1940), the Court reversed the conviction of certain Jehovah's Witnesses who had been convicted under statutes which prohibited solicitation without a permit where the official charged with issuing the permits was required to do so only if he determined that the cause was religious. Nonetheless, Justice Roberts proceeded to comment:

Nothing we have said is intended even remotely to imply that, under the cloak of religion, persons may, with impunity, commit frauds upon the public. Certainly penal laws are available to punish such conduct. Even the exercise of religion may be at some slight inconvenience in order that the State may protect its citizens from injury.

Id. at 306.

¹⁵⁴ *Reynolds v. United States*, 98 U.S. 145 (1879). See generally note 82 *supra*.

¹⁵⁵ *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

¹⁵⁶ *Schenck v. United States*, 249 U.S. 47 (1919).

¹⁵⁷ Public commercial speech, for example, has recently been affirmed as subject to the limit of "false, deceptive, and misleading" in the midst of a balancing opinion. See *Friedman v. Rogers*, 440 U.S. 1, 9 (1979).

defendants' free exercise of religion. The receiver's hiring of a disfellowshipped member to work at church headquarters against the express beliefs of the church should have been sufficient to show that the state had burdened defendant's religion, for it was forbidden for members of the church to associate with the disfellowshipped.¹⁵⁸ At this point, the onus would have shifted to the state to show that it had a compelling state interest.

Three compelling state interests could have been advanced by California; in fact, only the charitable trust theory was proffered.¹⁵⁹ It is difficult to imagine this legal fiction rising to the level of a compelling reason. Where gifts are given "without restriction," it would be the height of folly for the state to insist that they were really given with the restriction imposed by the purpose clause now existing in the non-profit's articles of incorporation. Aside from this, even if the implied trust were a faithful reflection of the real world, it still would not rise to the level of a compelling interest. Moreover, even if the state could demonstrate such a need, the least restrictive means test remains. The work of the receiver might be prolonged without the knowledge the disfellowshipped member brings to the receivership, but this is precisely what the least restrictive means test is about. The force of the test is not to promote efficiency in state regulation, but to allow the state to intrude, where intrusion is essential, in the most de minimus manner possible.

A second compelling state interest could be found in the need to protect minority rights.¹⁶⁰ If the minority lacks standing or the motivation to protect itself, the state may have an interest in preventing their subjugation. Even assuming that this is an interest which could approach the necessary compelling status, the hiring of a disfellowshipped member would not seem to meet this goal or the least restrictive means test. Moreover, if the rights of individual members are involved,¹⁶¹ courts should move cautiously for two reasons. First, the principle of member consent in the case of voluntary associations is well recognized. Members may surrender certain constitutional rights by affiliating with the association and regain them only upon severing the connection.¹⁶² Second, the deprivation of individual liberty alleged may be no more than a theological schism with the practical outcome of a church property

¹⁵⁸ See note 27 *supra*.

¹⁵⁹ See Brief for Respondent, *supra* note 11; text accompanying note 14 *supra*.

¹⁶⁰ See notes 67-69 & accompanying text *supra*.

¹⁶¹ Complaints regarding the Worldwide Church of God were made to the attorney general by six individuals who were given relator status. These individuals subsequently dropped out of the suit. Brief for Respondent, *supra* note 11, at 1-2.

¹⁶² Chafee, *The Internal Affairs of Associations Not for Profit*, 43 HARV. L. REV. 993, 1017-18 (1930).

dispute.¹⁶³ Conceivably, a minority, or a majority not entitled to church property,¹⁶⁴ might find itself declared a majority or otherwise entitled to the property if the majority or those theoretically entitled to the property were replaced as were the defendants in *Worldwide Church*. The courts cannot be placed in the position of making decisions on how the church should allocate its resources so as to best stay within the confines of church doctrine.

A third compelling state interest might have been found in the allegations of the attorney general in *Worldwide Church*.¹⁶⁵ If true, these allegations could amount to fraud. The prevention of fraud would seem to be a compelling interest of the state. It can be argued that when a receiver and the state act to prevent fraud, religion is not burdened; but this contention is persuasive only where no legitimate religious activity is present. Where that activity is present, however, religion is burdened and the burden can be justified only by the state's compelling interest in preventing fraud. Even then, appointment of a receiver may not be the least restrictive means¹⁶⁶ and each of the receiver's acts should be measured against the compelling interest-least restrictive means test. The fraud rationale cannot, without more, do the double duty of both justifying the intrusion and validating all that happens in the process of the intrusion.¹⁶⁷

A result different from that arrived at under such a balancing test may be reached if the state's actions were measured against the limit test. Under the limit test, the Supreme Court tends to look more closely at the alleged conduct of the defendant and less closely at the coercive nature of the statute.¹⁶⁸ In *Worldwide Church* the alleged activity was misuse of church funds and self-dealing, seemingly bringing *Worldwide Church* within the scope of *Davis v. Beason*¹⁶⁹ and the dicta of *Cantwell v. Connecticut*.¹⁷⁰ Therefore, the limit test might have condoned Cali-

¹⁶³ It has been suggested that the six relators were, in fact, part of a disenchanted segment of the church which had previously broken away. *Post-Guyana Hysteria*, *supra* note 10, at 3.

¹⁶⁴ See notes 107-30 & accompanying text *supra*. See generally note 82 *supra*.

¹⁶⁵ See notes 13, 19 & accompanying text *supra*. Fraud is not religion and the state's interest in its prevention is recognized. See note 148 & accompanying text *supra*.

¹⁶⁶ If an injunction could have served the same purpose as the receivership, California might fail to meet the least restrictive means test. See note 38 & accompanying text *supra*.

¹⁶⁷ See *L. TRIBE*, *supra* note 94, at 855.

¹⁶⁸ "[W]e do not intimate or suggest . . . that any conduct can be made a religious rite and by the zeal of the practitioners swept into the First Amendment." *Murdock v. Pennsylvania*, 319 U.S. 105, 109 (1943).

¹⁶⁹ 133 U.S. 333 (1890); see note 153 *supra*.

¹⁷⁰ 310 U.S. 296 (1940); see note 153 *supra*. Legislation such as prohibitions against fortune telling, which is designed to prevent fraud, frequently prompts claims that the proscribed conduct is necessary for an individual's practice of religion. Typically, courts recognize the constitutionality of such statutes. Few cases deal with the issue of whether the practice the state seeks to prohibit is fraud or religion. The determining factor may be

fornia's imposition of a receiver. Condoning the imposition of a receiver, however, must be kept analytically distinct from condoning the acts of the receiver. To continue with the illustration of hiring the disfellowshipped member, it is not self-evident that the state must strike out at fraud by this means. Less restrictive means should be available. Thus, while the limit test might have validated the receiver's appointment, the test would not commit courts to an acceptance of the receiver's actions without question.¹⁷¹

CONCLUSION

Worldwide Church has significance as a nonprofit case and as a first amendment case—the former in that it illustrates the inadequacy of the law which was applied, the latter in that it illustrates the special considerations arising when the corporation is also a church. Much nonprofit litigation, *Worldwide Church* included, reflects a tension between the individual rights of both minorities and majorities and the rights of the state. In years past, individuals wishing to bring actions against nonprofit corporations have experienced standing problems for want of economic injury. The literature is replete with commentaries on the rights of members of associations¹⁷² and the difficulties encountered having rights of action recognized.¹⁷³ The problem of making nonprofit corporations accountable, however, is not to be met by relaxing the standards by which they are to be held accountable or by reference to legal fictions such as the charitable trust theory. These are substitutes for analysis.

Worldwide Church offers the opportunity not only to clarify the scope of first amendment protection available to religious organizations facing receivership actions, but also to examine the treatment of nonprofit corporations in general and their rights in receivership actions in particular. As California courts apply the new Nonprofit Corporation Code, *Worldwide Church* invites reassessment of the charitable trust theory which has been a part of California statutory and common law.

As a first amendment case, *Worldwide Church* is significant both as an establishment and a free exercise case. Courts have assumed that the

no more than whether compensation is involved. See C. ANTIEAU, T. BURKE & P. CARROLL, *supra* note 149, at 84-85.

It is noteworthy that the recent action of the California legislature, *see* note 82 *supra*, seems to capitulate needlessly on the free exercise question. Where capitulation is both total and unwarranted, credibility is lent to the hypothesis that lobbying has been intensive on a highly emotional issue.

¹⁷¹ But *see* Note, *supra* note 82, at 277.

¹⁷² See generally Chafee, *supra* note 162, at 1008.

¹⁷³ See generally Baker, *Community Development Corporations: A Legal Analysis*, 12 VAL. U.L. REV. 33 (1978).

secular affairs of a religious organization are separable from its ecclesiastical affairs. If courts are to resolve conflicts where religious bodies are parties, this assumption must be made. More care, however, must be taken in distinguishing the secular from the ecclesiastical. A receivership order of the breadth of that in *Worldwide Church* blurs the distinction it purports to recognize.

An examination of the imposition of a receivership, grounded on the charitable trust theory, has shown that both the establishment and free exercise clauses are jeopardized when the candidate for receivership is a religious organization. The untenability of the secular-ecclesiastical theory thrusts the receiver into the religious life of the church, and the receiver's duties necessarily involve him in the detailed examination of religion prohibited by the establishment clause. Similarly, it does not appear that the receivership remedy can be justified under the compelling state interest-least restrictive means test currently used by the United States Supreme Court. Certainly in *Worldwide Church* no compelling state interest was shown. Even if that showing had been made, California would still have had to show that receivership placed less restriction on church members' free exercise than other alternatives, such as injunctive relief.

Jurisprudentially, *Worldwide Church* invites a re-examination of the charitable trust doctrine. Typically, minority rights have not been protected in nonprofit corporations. The charitable trust theory has served to protect minority rights but at the expense of perpetuating a legal fiction which, if taken literally, would serve to establish a religion in violation of the first amendment. In the absence of a clearly reasoned theory of minority rights, there is no guarantee that nonprofit corporations will not be harrassed even as for-profit corporations have been harrassed. At the other extreme, to make minority rights dependent upon state action may cause those rights to be lost in the absence of a sympathetic attorney general. In the presence of an overzealous attorney general, on the other hand, even the smallest minority could become a majority and the largest of majorities be transformed into a minority.

Nonprofits and churches alike pose unique problems for courts. These problems are neither to be resolved by heedless disregard of clearly enunciated constitutional principles nor by the unthinking application of principles and remedies from other areas of law. Adjudication in this area demands the construction of a new conceptual framework which will comprehend the distinguishing features of the nonprofit and the religious organization and which will embrace a sensitivity to the underlying constitutional considerations.

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